Ng Boon Meng v Petronas Dagangan Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7–22–1901 OF 2004
HARMINDAR SINGH JC
23 JUNE 2009

Land Law — Subdivision — Sale of land — Undivided land — Partition agreement by previous owner identified road reserve from main road to plots — Refusal by defendant to provide access road to plaintiff — Whether partition agreement binding on parties — Whether agreement breached — Whether defendant liable for damages

The plaintiff's suit involved an undivided piece of land held under Lot 2883, GRN 45192 Bukit Tanjong Duabelas, Daerah Kuala Langat, Negeri Selangor ('the piece of land'). The plaintiff and the first defendant were unregistered proprietors of an undivided half share each of the piece of land. The first defendant vide a sale and purchase agreement dated 20 October 2003, had purchased an undivided quarter share of the piece of land from the second defendant which was subsequently transferred to the first defendant. The previous owner of the piece of land, had executed a partition agreement dated 11 June 1990, for the purpose of identifying three plots of the piece of land. The three plots were identified by a survey plan attached to the partition agreement as 'plot No 1' for the owner prior to the first defendant, 'plot No 2' for the owner prior to the second defendant and 'plot No 3' for the owner prior to the plaintiff. The partition agreement had identified a road reserve from the main road going into plots Nos 1 and 2 leading to plot No 3 of the piece of land. However, the plaintiff submitted that there was no access road going through plot No 3 of the piece of land. The plaintiff claimed against the defendants for breaching the partition agreement and submitted that: (1) the defendants had failed to physically occupy the piece of land according to the partition agreement; (2) the defendants failed to provide the plaintiff with the easement in respect of a road reserve as provided in the partition agreement; and (3) the defendants failed to make an application for the subdivision of the piece of land. The defendants however, submitted that a right of way was granted but not in accordance to the partition agreement and the plaintiff was estopped from claiming for the access road as the previous owner of the piece of land had never complained in respect to the access road. The second defendant also argued that the evidence led by the plaintiff was at odds with the pleaded case and that the second defendant was taken by surprise and as such, prejudiced by the plaintiff's pleadings.

Held, allowing the plaintiff's claim with costs:

(1) The first and second defendants had breached the partition agreement for failing to provide the access road as set out in the survey plan. The claim that the access road was provided on the wrong side and that the plaintiff had access could not amount to a defence to the plaintiff's claim. Such claim could only go towards mitigation of damages to the plaintiff's claim. As for the contention of estoppel, it is not applicable as the intention of the previous owner was clear in that with the signing of the partition agreement, he had agreed to the partition as well as to the road reserve (see paras 8–9).

(2) There was no 'over-occupation' of the plaintiff's land. If there was any 'over-occupation' it was that of the road reserve set out in the partition agreement by the first and second defendants (see para 10).

(3) Distinction had to be made between partitioning the piece of land through an agreement and making a formal application to the relevant authorities to subdivide and partition the piece of land. The partition agreement was silent on the need to make a formal application for subdivision or to agree to any formal application for subdivision; hence, there was no breach on the part of the defendants in that regard (see para 12).

(4) The plaintiff had pleaded his case in the alternative as he was perfectly entitled to do. It was made clear that the plaintiff was taking the firm stance that the partition agreement was binding on the parties, hence, the objections that the second defendant was taken by surprise and had been prejudiced by the pleadings of the plaintiff to be of little merit (see para 13).

[Bahasa Malaysia summary

Guaman plaintif melibatkan sebidang tanah yang belum dipecahkan di bawah Lot 2883, GRN 45192 Bukit Tanjong Duabelas, Daerah Kuala Langat, Negeri Selangor ('sebidang tanah'). Plaintif dan defendan pertama merupakan pemilik tidak berdaftar yang masing-masing memiliki sebahagian daripada bahagian tanah yang belum dipecahkan tersebut. Defendan pertama melalui perjanjian jual dan beli bertarikh 20 Oktober 2003, telah membeli suku bahagian tanah yang belum dipecahkan daripada defendan kedua yang kemudiannya memindahkannya kepada defendan pertama. Pemilik tanah sebelumnya, telah menandatangani perjanjian pecah bahagian bertarikh 11 Jun 1990, bagi tujuan mengenal pasti ketiga-tiga petak tanah tersebut. Ketiga-tiga petak tersebut dikenal pasti melalui pelan tinjauan yang dikepilkan bersama dengan perjanjian pecah bahagian sebagai 'petak No 1' untuk pemilik sebelum defendan pertama, 'petak No 2' untuk pemilik

sebelum defendan kedua dan 'petak No 3' untuk pemilik sebelum plaintif. Perjanjian pecah bahagian tersebut telah mengindentifikasi jalan rizab daripada jalan utama ke dalam petak-petak No 1 dan 2 menuju ke tanah di petak No 3. Walau bagaimanapun, plaintif menghujah bahawa tiada jalan masuk melalui petak No 3 tanah tersebut. Plaintif mendakwa terhadap defendan-defendan kerana melanggar perjanjian pecah bahagian dan menghujah bahawa: (1) defendan-defendan gagal untuk menduduki tanah tersebut secara fizikal mengikut perjanjian pecah bahagian; (2) defendan-defendan gagal untuk menyediakan isemen berkenaan jalan rizab sepertimana yang diperuntukkan dalam perjanjian pecah bahagian; dan (3) defendan-defendan gagal untuk membuat permohonan untuk pecah bahagi tanah tersebut. Walau bagaimanapun defendan-defendan, menghujah bahawa satu hak lalu-lalang diberikan tetapi bukannya menurut perjanjian pecah bahagian dan plaintif diestop daripada menuntut jalan masuk memandangkan pemilik tanah sebelumnya tidak pernah mengadu berkenaan jalan masuk. Defendan kedua juga menghujah bahawa keterangan yang diberikan oleh plaintif bercanggah dengan kes yang diplid dan bahawa defendan kedua dikejutkan dan oleh itu diprejudiskan oleh pliding plaintif.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Defendan pertama dan kedua telah melanggar perjanjian pecah bahagian kerana gagal menyediakan jalan masuk sepertimana yang tertera di pelan tinjauan. Dakwaan bahawa jalan masuk disediakan pada bahagian yang salah dan bahawa plaintif mempunyai akses bukanlah pembelaan kepada tuntutan plaintif. Dakwaan tersebut hanya boleh mengurangkan ganti rugi kepada tuntutan plaintif. Berhubung dengan hujahan estopel, ianya tidak digunapakai memandangkan tujuan pemilik sebelumnya adalah jelas bahawa dengan menandatangani perjanjian pecah bahagian, dia telah bersetuju kepada pecah bahagian begitu juga dengan jalan rizab (lihat perenggan 8–9).

(2) Tidak terdapat 'over-occupation' tanah plaintif. Sekiranya terdapat apa-apa 'over-occupation' ia merupakan di atas jalan rizab sepertimana yang dinyatakan dalam perjanjian pecah bahagian oleh defendan pertama dan kedua (lihat perenggan 10).

(3) Perbandingan perlu dibuat di antara memecah bahagikan tanah melalui perjanjian dan membuat permohonan formal kepada pihak berkuasa yang relevan untuk memecah bahagikan tanah. Perjanjian pecah bahagian tidak menyatakan keperluan untuk membuat sebarang permohonan formal untuk pecah bahagian atau untuk bersetuju dengan sebarang permohonan formal untuk pecah bahagian, oleh itu, tiada pelanggaran oleh pihak defendan-defendan berkenaannya (lihat perenggan 12).

(4) Plaintif telah memplid kesnya sebagai alternatif memandangkan dia berhak berbuat demikian. Adalah jelas bahawa plaintif telah membuat pendirian yang kukuh bahawa perjanjian pecah bahagian mengikat pihak-pihak, oleh itu, bantahan-bantahan bahawa defendan kedua dikejutkan dan telah diprejudis oleh pliding-pliding plaintif kurang merit (lihat perenggan 13).]

Notes

For cases on subdivision of land in general, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4515–4521.

GT Fernandez (GT Fernandez & Co) for the plaintiff.
Robert Low (David Cheong with him) (Ranjit Ooi & Robert Low) for the first defendant.
James Culaz (Zuri & Co) for the second defendant.

Harmindar Singh JC:

[1] The suit involves an undivided piece of land held under Lot No 2883, GRN 45192 (formerly CT12665) Mukim Tanjong Duabelas, Daerah Kuala Langat, Negeri Selangor ('the said land'). Presently, the plaintiff and the first defendant are the registered proprietors of an undivided 1/2 share each of the land. The first defendant had vide a sale and purchase agreement dated 20 October 2003 purchased an undivided 1/4 share of the land from the second defendant. The said share was subsequently transferred to the first defendant on 20 January 2006.

[2] Prior to this, the previous owners of the land had executed a partition agreement dated 11 June 1990 for the purpose of identifying their respective plots. The plots were identified through a survey plan attached to the partition agreement and marked as 'plot 1' for the owner prior to the first defendant, 'plot 2' for the owner prior to the second defendant and 'plot 3' for the owner prior to the plaintiff. At the time of the trial, it had become common ground that all the parties to the dispute were bound by this partition agreement.

[3] The plaintiff is now claiming against the defendants for breach of the partition agreement in that:

(1) the defendants had failed to physically occupy the said land in accordance with the partition agreement;

(2) the defendants had failed to provide the plaintiff with the easement in respect of the road reserve as provided in the partition agreement; and

(3) the defendants had failed to make an application to the appropriate authority for the subdivision of the land. A

[4] Be that as it may, the true question that falls for consideration in resolving the issues between the parties is to determine what was agreed in the partition agreement and to determine if there was any breach of the same as alleged by the plaintiff. B

[5] It was clear from a perusal of the partition agreement and the survey plan attached to it, that the respective plots of the landowners ie plots 1, 2, and 3, were demarcated and identified. A road reserve was also identified in this survey plan measuring 20 feet wide from the main road and going into plots 1 and 2 leading to plot 3 on the said land. C

[6] Was this road reserve or access road provided as set out in the partition agreement? In this regard, the plaintiff had commissioned a licensed land surveyor (SP2) who then prepared a survey plan (exh P10). SP2 testified that according to the survey done on the said land in 2003, he found that there was no access road going through the plaintiff's portion at plot 3 of the said land. D E

[7] That there was no road reserve or access road as set out in the partition agreement was not seriously disputed. Instead, what was argued by the first and second defendants was that a right of way was granted but on the opposite side. The first defendant further argued that since the previous owner, Saw Bah never made any complaints pertaining to the access road, the plaintiff is now estopped from claiming the same. F

[8] This being the case, there was therefore little doubt that there has occurred a clear breach of the partition agreement in that there was a failure to provide the road reserve by both the first and second defendants as set out in the survey plan. The claim that the access was provided on the wrong side and that the plaintiff had access cannot amount to a defence to the plaintiff's claim. At best, these claims can only go towards mitigation of damages to the plaintiff's claim. G H

[9] As for the contention of estoppel, I think this is a non-starter as the intention of Saw Bah was clear in that with his signing of the partition agreement, he had agreed to the partition as well as to the road reserve. His silence cannot now amount to acquiescence to the road access. In any event, how do we know that he did not complain? He is now no longer alive. It is easy for the defendants to make these assertions knowing very well that they cannot be rebutted. Without any further evidence, the court had a duty to give effect to the bargain of the parties as set out in the partition agreement. I

A For these reasons, the first and second defendants were in breach of the partition agreement by failing to provide the road reserve and were therefore, liable in damages.

B **[10]** The next question for consideration is whether there was over-occupation of the plaintiff's land. If there was, it may give rise to a claim for damages for trespass. In this regard, I do not see how there was over-occupation. The plaintiff's entitlement under the partition agreement was a total land area of 0.3812 hectares (equivalent to 3812 square metres). When SP2, the surveyor, carried out his survey, it was found that the plaintiff C was occupying an area of approximately 3,814 square metres. There was therefore no over-occupation of the plaintiff's land. If there was any over-occupation it was that of the road reserve set out in the partition agreement by the first and second defendants. Therefore, I do not see how this claim can succeed.

D

[11] The final question is on the issue of subdivision. The plaintiff contends that there has been a breach of the partition agreement by the failure of the first and second defendants to partition or subdivide the land. E The plaintiff submits that the title of the survey plan itself makes it clear that the land was to be partitioned.

[12] In this regard, I think a distinction has to be made between partitioning the land through an agreement and making a formal application F to the relevant authorities to subdivide and partition the land. For the latter to be the case, there must be some specific provision or specific obligation cast upon a party to make the application. Upon a careful perusal of the provisions of the partition agreement, I can find no such express obligation. It may well have been in the minds of the parties that at same point of time G there would be a formal partition application. In fact, there were attempts to do so albeit unsuccessful. Nevertheless the partition agreement is silent on the need to make a formal application for subdivision or to agree to any formal application for subdivision. I therefore find no breach on the part of the defendants in this regard. The plaintiff's contention must therefore fail.

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[13] In coming to these conclusions, I have not overlooked the second defendant's submission on the issue of pleadings. It was contended on behalf of the second defendant that the evidence led by the plaintiff was clearly at odds with the pleaded case. I think the main quarrel was with the plaintiff's I stance that he was not bound by the partition agreement. In this regard, it must be recalled that the function of pleadings is to narrow down the issues and prevent surprise at the trial. The plaintiff had pleaded his case in the alternative as he was perfectly entitled to do. The plaintiff had in fact filed an application to amend the pleadings to reflect the change in stance after a

consent order was recorded between the plaintiff and the first defendant on 21 December 2008. The defendants objected to this application which was subsequently refused by the senior assistant registrar. It is therefore surprising that the second defendant is now raising this as an issue. Further, at the outset of the trial, it was made clear that the plaintiff was now taking the firm stance that the partition agreement was binding on the parties. Looking at these circumstances, I can't see how the second defendant was taken by surprise and had been prejudiced by the pleadings of the plaintiff. For these reasons, I found the objections of the second defendant in this regard to be of little merit.

[14] In the result, I find that the first and second defendants have been in breach of the partition agreement for failing to provide the road reserve or access road as indicated in the survey plan attached. The plaintiff is entitled to damages for this breach. As was agreed, damages will be assessed by the senior assistant registrar. The plaintiff is also entitled to costs of this action.

Plaintiff's claim allowed with costs.

Reported by Mashrifah Ravendran